

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR CHANGE OF APPROPRIATION WATER)	FINAL ORDER
RIGHT V(W)099722-76H BY MONTANA)	
DEPARTMENT OF FISH, WILDLIFE)	
AND PARKS)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the April 28, 1995, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Authorization to Change Appropriation Water Right V(W)099722-76H is granted to Montana Department of Fish, Wildlife and Parks to lease and temporarily change, the following water rights: 76H-W099722, 76H-W110547, 76H-116613, 76H-W147818, and 76H-W150165. The purpose of use for the above water rights shall be changed from irrigation to instream flow to enhance the flow of Tin Cup Creek, to improve conditions for the spawning and rearing of trout. The flow rates to be protected instream are: up to 2.28 cubic feet per second from April 1 through April 14; up

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to 4.32 cubic feet per second from April 15 through April 30; up to 4.72 cubic feet per second from May 1 through October 19; and up to 1.8 cubic feet per second from October 20 through November 4. The place of use shall be changed from 1.00 acre in the $W\frac{1}{2}SW\frac{1}{2}SW\frac{1}{2}$ of Section 26; 24.00 acres in the $SE\frac{1}{2}SE\frac{1}{2}$ of Section 27; 173.00 acres in the $E\frac{1}{2}$ of Section 34; and 1.00 acre in the $W\frac{1}{2}NW\frac{1}{2}NW\frac{1}{2}$ Section 35, all in Township 04 North, Range 21 West, to Tin Cup Creek from the headgate in the $SE\frac{1}{2}NE\frac{1}{2}NW\frac{1}{2}$ of Section 23 to the creek's confluence with the Bitterroot River in the $SW\frac{1}{2}SW\frac{1}{2}NE\frac{1}{2}$ of Section 14, all in Township 03 North, Range 21 West, a distance of approximately seven-eighths of a mile.

A. The appropriator shall install an adequate flow measuring device downstream from the Waddell Ditch at or near the highway bridge or where directed by the water commissioner.

B. This right is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply, the water to which they are entitled. The appropriator shall pay its proportionate share of the fees, compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

C. If, at any time after this right is issued, a written complaint is received by the Department alleging that diverting water from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient

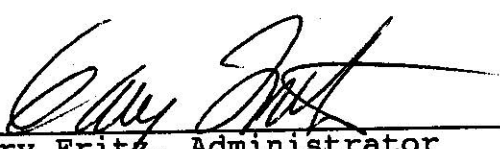
evidence supporting the allegation, it may conduct a hearing in the matter allowing the appropriator to show cause why the right should not be modified or revoked. The Department may then modify or revoke this right to protect existing rights or leave this right unchanged if the hearing officer determines no existing water rights are being adversely affected.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 6 day of June, 1995.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 6th day of June, 1995 as follows:

Robert Lane, Liter Spence,
and Fred Nelson
Montana Department of Fish,
Wildlife and Parks
1420 E. 6th Ave.
P.O. Box 200701
Helena, MT 59620-0701

Phyllis Parmenter
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Melvin F. Pervais
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John E. Bloomquist
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Curt Martin, Manager
Missoula Water Resources
Regional Office
1610 South 3rd St. West,
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Missoula, MT 59806
(via electronic mail)

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
TO CHANGE APPROPRIATION WATER)	PROPOSAL
RIGHT V(W)099722-76H BY MONTANA)	FOR
DEPARTMENT OF FISH, WILDLIFE)	DECISION
AND PARKS)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on March 22, 1995, in Hamilton, Montana, to determine whether Authorization to Change Appropriation Water Right V(W)099722-76H should be granted to Montana Department of Fish, Wildlife & Parks for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-402(2) and in accordance with § 85-2-436 (1993).

APPEARANCES

Applicant Montana Department of Fish, Wildlife & Parks (MDFWP) appeared at the hearing by and through counsel, Robert Lane.

Frederick A. Nelson and Christopher G. Clancy, Fisheries Biologists with MDFWP, appeared at the hearing as witnesses for Applicant.

Liter Spence, Water Resources Supervisor with MDFWP, appeared at the hearing but did not testify.

John Westenberg, Water Rights Specialist, and Ross Miller, Engineer and Hydrogeologist, both with Land and Water Consulting, Inc., appeared at the hearing as witnesses for Applicant.

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Gary Boyer, owner of one of the water rights Applicant seeks to change, appeared at the hearing as a witness for Applicant.

Objector Melvin F. Pervais, owner of Chief Joseph Ranch, appeared at the hearing *pro se*.

Objector Phyllis Parmenter withdrew her objection to this application on March 6, 1995.

Wes McAlpin, Water Resources Specialist, and Cynthia Spethman, Receptionist, both with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

EXHIBITS

Applicant offered two exhibits for the record. Both were accepted without objection.

Applicant's Exhibit 1 consists of three pages which are flow measurement notes taken by Applicant on July 20, 1994, at three different locations on Tin Cup Creek.

Applicant's Exhibit 2 consists of four pages which are excerpts from a report prepared by the United States Department of Agriculture, Soil Conservation Service in April 1947, entitled "Reconnaissance Conservation Report on Water Control, Use and Disposal, Bitterroot River Drainage Basin, Ravalli County, Montana."

Objector Pervais offered no exhibits for the record.

The Department file was made available for review by all parties who expressed no objection to any part of it; therefore, the Department file is accepted into the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. An application in the name of Montana Department of Fish, Wildlife and Parks signed by Frederick A. Nelson was duly filed with the Department on January 14, 1994, at 10:35 a.m. (Department file.)

2. Pertinent portions of the application were published in the *Ravalli Republic*, a newspaper of general circulation in the area of the source, on September 1, 1994, and a corrected notice was published in the *Ravalli Republic* on September 12, 1994. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application.

The Department received two timely objections to this application and notified Applicant of these objections by a letter dated October 14, 1994.

Objector Pervais, in his filed objection, stated, "I object to this right being changed from irrigation water to another use, i.e., same as we can't use irrigation water for stock water vs irrigation water for fish. [sic] This change will adversely affect Chief Joseph Ranch. The water has not been used for 25 years and by using it now could cause an adverse affect [sic]." (Department file.)

3. Applicant proposes to lease and temporarily change for a period of five years, the following claimed water rights: 76H-W099722, 76H-W110547, 76H-116613, 76H-W147818, and 76H-W150165. These water rights are the first priority rights on Tin Cup Creek. The purpose of use for the above water rights would be changed from irrigation to instream flow to enhance the flow of Tin Cup Creek, improving conditions for the spawning and rearing of trout. (Department file and testimony of Christopher Clancy and John Westenberg.)

4. On July 20, 1994, Applicant measured the flow of the Tin Cup Creek at the Little Dipper Bridge to be 6.3 cubic feet per second. The stream flow was measured that same day at the Monroe Bridge where it was 6.82 cubic feet per second. The flow rate also taken on July 20, 1994, near the mouth of Tin Cup Creek was 7.38 cubic feet per second. The historic flow rates for the irrigation use, flow rates to be protected instream, are: up to 2.28 cubic feet per second from April 1 through April 14; up to 4.32 cubic feet per second from April 15 through April 30; up to 4.72 cubic feet per second from May 1 through October 19; and up to 1.8 cubic feet per second from October 20 through November 4. (Applicant's Exhibit 1, testimony of Christopher Clancy, and Department file.)

5. Historically the owners of the water rights proposed for change have diverted their water from Tin Cup Creek into the Waddell Ditch at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 23, Township 03 North, Range 21 West, Ravalli County, Montana, for irrigation

of approximately 199 acres. Applicant proposes to leave that water in the stream to flow by the historical point of diversion and maintain the stream flows in the lower portion of Tin Cup Creek from April 1 through November 4, inclusive of each year. The place of use would be changed from 1.00 acre in the $W\frac{1}{2}SW\frac{1}{4}SW\frac{1}{4}$ of Section 26; 24.00 acres in the $SE\frac{1}{4}SE\frac{1}{4}$ of Section 27; 173.00 acres in the $E\frac{1}{2}$ of Section 34; and 1.00 acre in the $W\frac{1}{2}NW\frac{1}{4}NW\frac{1}{4}$ Section 35, all in Township 04 North, Range 21 West, to Tin Cup Creek from the headgate in the $SE\frac{1}{4}NE\frac{1}{4}NW\frac{1}{4}$ of Section 23 to the creek's confluence with the Bitterroot River in the $SW\frac{1}{4}SW\frac{1}{4}NE\frac{1}{4}$ of Section 14, all in Township 03 North, Range 21 West, a distance of approximately seven-eighths of a mile. (Department file and testimony of Christopher Clancy and John Westenberg.)

6. Tin Cup Creek is a decreed stream and a water commissioner is appointed every year, except very wet years, to admeasure and distribute the water according to priority to those who are allotted water under the decree. Applicant would install a stream gauge on Tin Cup Creek to monitor the delivery of its leased water and to assist the water commissioner. If, in the future, additional stream flow monitoring sites are needed to better administer the lease, Applicant would consider installing and maintaining metal staff gauges at appropriate sites. Under the lease agreement, the lessors would pay the first \$200.00 charged by the water commissioner for administering their rights and Applicant would pay the remainder. (Department file.)

7. The water rights proposed for change were exercised on a continuous basis from 1883 through 1968. The Waddell Ditch, which transported the water, skirts the town of Darby. Conflicts with residential development in Darby resulted in the ditch being blocked and the water users have been unable to use their water rights since 1968. The water users have repeatedly attempted without success, to exercise the water rights during this long period of nonuse. The Department received no request during these proceedings to certify the abandonment issue posed by these facts to district court for determination. (Department file and testimony of John Westenberg and Gary Boyer.)

8. Since the place of use for the rights proposed to be changed is located out of the Tin Cup Creek drainage, very little return flow reentered Tin Cup Creek. Any unused water would flow into the Bitterroot River. (Applicant's Exhibit 2, and testimony of John Westenberg and Ross Miller.)

9. Tin Cup Creek is a gaining stream below the Waddell Ditch diversion. Therefore, the water left in this reach of the stream as a result of the change would not be lost, but would remain in the stream to enhance the flow for fisheries. (Applicant's Exhibit 1 and testimony of Christopher Clancy.)

10. After the Waddell Ditch was blocked, water that had been used to fill the rights proposed for change has been available to junior users. Water users of the Mill Ditch have been particularly benefitted by nonuse of the rights proposed for change. If the change is granted, the water will no longer be

available to the Mill Ditch. However, only one of the Mill Ditch users objected to the instant application even though they were all sent individual notices of the proposed change. The Mill Ditch user who did object withdrew her objection prior to the hearing. (Department file and testimony of Gary Boyer, John Westenberg, and Melvin Pervais.)

11. Applicant is the executive branch agency mandated by statute to provide for the protection, preservation, and propagation of all fish and wildlife and their habitat within the state. Applicant has authority to acquire waters for fish and wildlife habitat. (Department file.)

12. There are no planned uses or developments on Tin Cup Creek for which a permit has been issued or for which water has been reserved. (Department file and records.)

13. No objections relative to water quality were filed against this application. (Department file.)

14. No construction of appropriation works is required for the proposed change. (Department file.)

15. The proposed change does not involve salvage water. (Department file.)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been

fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2.

2. The proposed use of water, enhancement of stream flow for fishery, is a beneficial use of water. Mont. Code Ann. § 85-2-102(2)(a) (1993); see Findings of Fact 3 and 9.

3. Applicant has provided a preponderance of evidence that the water rights of an appropriator will not be adversely affected. Objector Pervais presented no evidence to establish how his water rights would be affected by the proposed change. See Findings of Fact 4, 5, 6, 7, 8, and 10.

4. This agency is without jurisdiction to declare existing rights abandoned through nonuse. The evidence presented at the hearing, however, does not indicate abandonment. See Finding of Fact 7.

5. Applicant is not required to prove the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b) (1993); see Finding of Fact 14.

6. Applicant has a possessory interest, or the written consent of the person who has the possessory interest, in the property where the water is to be put to beneficial use. See Finding of Fact 11.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 12.

8. Applicant is not required to prove no adverse effect to water quality or the ability of a discharge permitholder to satisfy effluent limitations. Mont. Code Ann § 85-2-402(3) (1993); see Finding of Fact 13.

9. Applicant is not required to prove water-saving methods that would salvage water. Mont. Code Ann. § 85-2-402(2)(e) (1993); see Finding of Fact 15.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below Authorization to Change Appropriation Water Right V(W)099722-76H is granted to Montana Department of Fish, Wildlife and Parks to lease and temporarily change, the following water rights: 76H-W099722, 76H-W110547, 76H-116613, 76H-W147818, and 76H-W150165. The purpose of use for the above water rights shall be changed from irrigation to instream flow to enhance the flow of Tin Cup Creek, to improve conditions for the spawning and rearing of trout. The flow rates to be protected instream are: up to 2.28 cubic feet per second from April 1 through April 14; up to 4.32 cubic feet per second from April 15 through April 30; up to 4.72 cubic feet per second from May 1 through October 19; and up to 1.8 cubic feet per second from October 20 through November 4. The place of use shall be changed from 1.00 acre in the W $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 26; 24.00 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27; 173.00 acres in the E $\frac{1}{2}$ of Section 34; and

1.00 acre in the W $\frac{1}{2}$ NW $\frac{1}{2}$ NW $\frac{1}{2}$ Section 35, all in Township 04 North, Range 21 West, to Tin Cup Creek from the headgate in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 23 to the creek's confluence with the Bitterroot River in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, all in Township 03 North, Range 21 West, a distance of approximately seven-eighths of a mile.

A. The appropriator shall install an adequate flow measuring device downstream from the Waddell Ditch at or near the highway bridge or where directed by the water commissioner.

B. This right is subject to the authority of court appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply, the water to which they are entitled. The appropriator shall pay its proportionate share of the fees, compensation and expenses, as fixed by the district court, incurred in the distribution of the waters.

C. If, at any time after this right is issued, a written complaint is received by the Department alleging that diverting water from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the appropriator to show cause why the right should not be modified or revoked. The Department may then modify or revoke this right to protect existing rights or

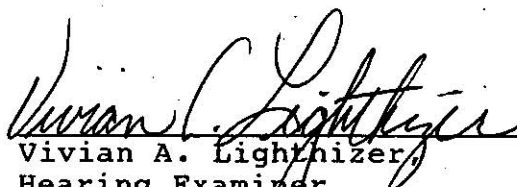
leave this right unchanged if the hearing officer determines no existing water rights are being adversely affected.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

DATED this 28th day of April, 1995.


Vivian A. Lightizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620

MEMORANDUM

The water proposed for change in this case has not been used for over 25 years. During this period of nonuse, the unused water was available to junior water rights. Over such a long period of time it is possible that some of these junior users may have come to rely on the water made available through the nonuse. If after this change, the water must be left in the stream, it will again be unavailable to junior users. Objector complains that this unavailability will adversely affect his rights.

Unavailability of water caused by resumed use of valid senior rights, is not adverse effect to junior rights for purposes of the change of use criteria. See Mont. Code Ann. § 85-2-402(2)(a) (1993). Unless the rights are abandoned, senior water users are entitled to resume using their dormant rights. Only if the senior right users were increasing their use over the historic levels would the junior users be adversely affected. In this case the historic use of the rights proposed for change are well established by a decree and other information in the record. The water commissioner and other conditions in the change authorization can insure that the new use will not enlarge the rights proposed for change. The amounts of water decreed for the rights will be delivered by the water commissioner to the water users dependent, as in the past, on water availability.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 2nd day of May ⁽⁶⁾ ~~April~~ 1995, as follows:

Robert Lane, Liter Spence,
and Fred Nelson
Montana Department of Fish,
Wildlife and Parks
1420 E. 6th Ave.
P.O. Box 200701
Helena, MT 59620-0701

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Hearings Unit Legal Secretary